Martiki Coal Corporation, a wholly-owned subsidiary of Mapco Coal, Inc., and Charles Clearing Contractor, Inc. *and* Bill R. Webb. Case 9–CA–29975

October 31, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On September 16, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. Respondents Martiki Coal Corporation, Mapco Coal, Inc., and Charles Clearing Contractor, Inc. each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision and to adopt the recommended Order as modified.

As more fully set forth in the attached decision, the administrative law judge found that Respondent Charles Clearing Contractor, Inc. (Charles Clearing) violated Section 8(a)(1) by failing to recall lawfully laid-off economic strikers, and violated Section 8(a)(4) because this failure to recall was in retaliation for the filing of unfair labor practice charges with the Board. He also found that Respondent Mapco Coal, Inc. and its wholly-owned subsidiary Martiki Coal Corporation are single employers. Further, because he found that Respondent Martiki Coal Corporation (Martiki) was a joint employer with Charles Clearing, he found that both Respondent Mapco Coal, Inc. (Mapco) and Martiki are jointly liable for remedying the violations found.

We adopt the judge's finding that Respondent Charles Clearing violated Section 8(a)(1) of the Act.[1] Contrary to the judge, however, we find that Martiki was not a joint employer with Charles Clearing. Accordingly, we need not reach the issue of whether Martiki and Mapco are a single employer. We dismiss the complaint as to both.

The Unfair Labor Practice

Respondent Charles Clearing provides contract labor to operate a coal mine owned by Respondent Martiki. Charles Clearing employees, then numbering approximately 76,[2] began an economic strike on Monday, February 3, 1992. On Friday, February 7, Martiki informed Charles Clearing President Argyle Charles that it would be cutting production and would require only 50 employees. At that point about 32 strikers had returned to work. Argyle Charles told employees on the picket line about the reduction, informed them there would be layoffs, and announced that he would take back the first 18 strikers to call him over the weekend and agree to cross the picket line.[3] Some strikers attempted, with mixed success, to telephone Argyle Charles during the weekend to return to work. Many of the strikers, apparently including those who had telephoned, reported to the mine on Monday, February 10, and were put to work or laid off, depending on whether they were among the first 18.[4] Picketing ceased at that point. On March 25, 1992, employees filed charges—later dismissed—alleging that the layoff was an unfair labor practice.

The judge found that, by telephoning Argyle Charles during the weekend, reporting in on February 10, and ending the picketing, ''most of'' the economic strikers made an unconditional offer to return to work and were not obligated to make additional offers. The judge further found that Argyle Charles recognized the strikers' conduct as expressions of an intent to return, specifically accepted these expressions of intent, and

[1] In view of this finding, we do not reach the issue of whether the Respondent Charles Clearing also violated Sec. 8(a)(4). This decision does not change the remedy, which we adopt, for Charles Clearing's unlawful failure to reinstate the striking employees who unconditionally offered to return to work. Further, unlike the judge, we do not rely on *Cargill Poultry Co.*, 292 NLRB 738 (1989), or *Abilities & Goodwill*, 241 NLRB 27 (1979). Those cases, unlike the one before us, involve an employer's unlawful termination of strikers who, as a consequence of their unlawful termination, did not tender an unconditional offer to return to work.

[2] The judge's findings regarding the exact number of striking employees are unclear. His decision recites at one point that, at the time of the hearing, Respondent Charles Clearing had ''approximately 78 employees at the mine site, *two more than* it had in February 1992.'' Later, the judge found that ''[o]n February 6, [1992], about 32 of the approximately *78* striking employees returned to work.'' (Emphasis added.) Based on the following evidence showing the reemployment of 50 strikers and on the parties' stipulation (infra, fn. 4) at the hearing that 26 employees were laid off on February 10, we calculate that Respondent Charles Clearing employed 76 employees on the date of the strike.

[3] There were approximately four or five pickets on duty at each gate that day. There is no evidence that Charles made a systematic attempt to notify employees of these events. On the contrary, word appears to have spread among striking employees through the grapevine.

[4] At the hearing the parties stipulated that the following 26 employees were laid off on February 10, 1992, and that Respondent Charles Clearing subsequently failed to recall them: Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Willis Fletcher, Craig Hale, Ronnie Hall, Paul Hinkle, Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mickey Jude, Warren Jude, Brian Lowe, Freddy Moore, Shelby Moore, Harold Muncy, Stewart Preece, Chester Ramey, Jeffrey Taylor, Jonathan Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb. In addition, the complaint alleged that a 27th employee, Dewey Jude, had been laid off on February 10. The judge did not find that Dewey Jude was laid off and unlawfully denied reinstatement, and there were no exceptions (see fn. 6, infra).

asserted that he would ''try to get them back,'' or ''if something opened up he would give them a call,'' and in some cases actually offered to rehire them at a later date.[5]

We adopt the judge's findings, except as otherwise set forth.[6] Even though Charles Clearing had implemented a lawful layoff during the strike and had no jobs to offer some of the strikers between the layoff and the resumption of production starting in July 1992, it had an obligation to maintain a preferential hiring list of strikers who had made an unconditional offer to return to work and to return those employees to work when jobs became available. *Fleetwood Trailer Co*., supra. It failed to satisfy this obligation. When asked at the hearing for a reason why he did not recall the laid-off strikers, Argyle Charles responded that, ''I must have just looked over them at the time, later on.''

The Supreme Court has held that the basic right to reinstatement cannot depend on job availability as of the moment when the unconditional offer to return is filed. Id. at 381. The right to reinstatement can be defeated only if the employer can show a legitimate and substantial business justification. Id. In our view, forgetfulness and oversight do not qualify as legitimate and substantial justifications. Accordingly, we adopt the judge's finding that by its failure to offer reinstatement to the laid-off strikers named in this Decision and Order, Respondent Charles Clearing violated Section 8(a)(1).

Martiki's Status as a Joint Employer

The judge found that Respondents Charles Clearing and Martiki are joint employers of Charles Clearing's employees and, thus, that Martiki and Charles Clearing are jointly liable. We disagree. For the reasons that follow, we find that Martiki and Charles Clearing were joint employers, but only until sometime in March or April 1992.[7]

The joint-employer concept does not depend on the existence of a single integrated enterprise. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). The test for determining if two separate business entities are joint employers is whether the entities share or codetermine matters governing the essential terms and conditions of employment. Id.

Here, as set forth in detail in his decision, the judge found that Charles Clearing's employees were paid solely by Charles Clearing. He found, however, that Martiki managers and supervisors historically had effectively recommended job applicants to Charles, administered preemployment tests, and approved hiring decisions. They also had suggested and approved employee transfers from one type of work to another. Charles Clearing typically had employed only one supervisor per shift on the entire Martiki premises, and, partly out of necessity, Martiki supervisors had managed and directed the work of Charles Clearing employees on a regular and substantial basis. Martiki and Charles Clearing supervisors had engaged in meetings twice a day to coordinate work to be done. Martiki supervisors and managers had been significant partici-

[5] There is no evidence that Charles Clearing intended or believed, at the time of the layoff, that the underlying circumstances—reduction by a customer of a coal purchase contract in favor of lower spot market prices—would effect a permanent reduction in its work force. It is clear from the record that the market for coal was somewhat unstable and unpredictable and that Charles Clearing had experienced temporary layoffs in the past. In view of Argyle Charles' expressions of intent to reemploy the laid-off employees and their reasonable expectation that they would be recalled, and in the absence of evidence that the layoff effected a permanent change in Charles Clearing's work force, we do not find, as urged by Respondents Charles Clearing and Martiki, that the laid-off strikers' status as statutory employees had ended. See *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967).

[6] We reject Respondent Martiki's exceptions to the judge's finding that Bill Webb, Warren Jude, David Conrad, Brian Holbrook, Shelby Moore, Doug Wilson, Brian Lowe, Daniel Hutchinson, Ronald Blankenship, and Steve Boyd made unconditional offers. The record shows that these employees all reported to Argyle Charles and were laid off on Monday, February 10. We have found, contrary to the Respondent's assertion, that they were not obliged to make additional offers to return. Daniel Hutchinson testified only that he did not make any attempt to contact Charles Clearing about regaining employment *after* he was laid off on February 10. That testimony does not preclude a finding that he sought reinstatement at the time of the layoff by reporting to Charles Clearing that day. According to striker Steve Boyd, there were about 30 strikers present when Argyle Charles handed out the layoff notices. There is no evidence that Daniel Hutchinson was not among them. Although it is not entirely clear from this record if Daniel Hutchinson reported to Argyle Charles on February 10, we infer, consistent with the above evidence and the judge's findings, that Hutchinson did make an unconditional offer to return by reporting in to Charles Clearing on February 10. In any event, the record reflects that Daniel Hutchinson's brother David telephoned Charles Clearing approximately 4 months after the layoffs to request reinstatement on behalf of both.

For substantially the same reasons, we reject Respondent Charles Clearing's exceptions to the judge's finding that Ronnie Hall, Harold Muncy, Stewart Preece, Mickey Jude, Frank Webb, David Hutchinson, James Steven Arnette, and Jeff Taylor unconditionally offered to return. We also note the testimony of Mickey Jude and David Hutchinson that they made postlayoff telephone calls to Charles Clearing attempting to regain their jobs. James Steven Arnette and Jeff Taylor testified that they requested reemployment before and after the layoff.

Respondent Martiki also contends that there is no evidence to support the judge's finding that Paul Hinkle, Freddy Moore, and Dewey Jude made unconditional offers to return. We note, initially, that the complaint alleged, but the judge did not find, that Dewey Jude was unlawfully denied reinstatement. There were no exceptions to this omission. Thus, we need not address Respondent Martiki's exception as it pertains to Dewey Jude. The record, however, does not support a finding that Paul Hinkle and Freddy Moore made unconditional offers to return or that they believed that application for reinstatement would have been futile. Neither testified, and there is no other evidence bearing on the matter. We therefore reverse the judge's findings with regard to Paul Hinkle and Freddy Moore and modify the Order accordingly.

[7] We disavow the judge's characterization of Charles Clearing as a ''corporate shell'' of Respondent Martiki and, generally, the judge's analysis of the appropriateness of piercing the corporate veil.

pants in establishing work schedules and assignments of Charles Clearing employees, including overtime, approval of leave, and deciding where and how work would be done. Although Charles Clearing had maintained an office in a trailer on the Martiki site separate from Martiki's offices, Charles had no telephone and used Martiki's phone. Thus, employees called in sick to the Martiki office. Martiki had used its own vehicles to transport Charles Clearing's employees between Charles Clearing's trailer and various worksites.

In the above circumstances, we agree that Charles Clearing and Martiki were joint employers prior to March-April 1992.

The judge rejected the contention of both Charles Clearing and Martiki that in March or April 1992 Martiki took action to sever the joint-employer relationship. The judge found significant two evidentiary factors: (1) the record contains only one document relating to the alleged changes—a March 29, 1993 memo prepared by Martiki Operations Manager Houser listing 13 instructions to Martiki supervisors, and (2) inconsistent testimony regarding the month when the changes were implemented. Thus, he found that Martiki did not clearly establish the alleged changes as a matter of fact. We do not agree that the asserted paucity of documentary evidence or the lack of proof of a precise implementation date negates the existence, in fact, of a changed relationship, particularly in view of record evidence not discussed by the judge.

Managers and supervisors who testified for Charles Clearing and Martiki agreed that, because of concerns raised by the March 25 unfair labor practice charges, supra, Martiki initiated and Charles Clearing implemented changes. These changes were made with the express intent of disentangling Martiki from Charles Clearing's daily operations and control of its work force. John Stucker, Martiki general superintendent, testified that Respondent Martiki instructed Operations Manager Houser to require Charles Clearing to add additional supervision ''on the hill,'' to obtain its own telephone and to obtain a van for use in transporting its own employees to their worksites. The twice-daily Charles Clearing/Martiki joint supervisory meetings stopped, and Martiki supervisors ceased giving instructions to Charles Clearing employees. Charles Clearing Operations Manager Houser testified that he ordered that the changes be made and that Martiki ceased prehire testing of Charles Clearing job applicants.

Argyle Charles confirmed that the daily meetings between Charles Clearing and Martiki foremen had ended, that he hired additional foremen, and purchased vehicles to transport his employees to their worksites. Charles Clearing Foreman Parker corroborated Argyle Charles' testimony. Charles Clearing employee Wanda Bailey testified that Respondent Charles Clearing has its own telephone. Additionally, reemployed striker Harold Muncy testified that he had not received instructions from anyone at Martiki since he returned to work in July 1992. Wanda Bailey testified that since February 1992 she has not received instructions or assignments (including overtime) or sought approval of time off from a Martiki supervisor.[8] This evidence is consistent with the list of instructions to Charles Clearing supervisors contained in Houser's March 29, 1993 memo and the record does not contain any unequivocal evidence to the contrary.

We find the foregoing evidence persuasive and we conclude, contrary to the judge, that Respondent Martiki effectively severed the joint-employer relationship before the laid-off strikers were unlawfully denied reinstatement starting in July 1992. In that regard, we do not agree that Martiki's limited role in Charles Clearing's hiring of new employees, starting in July 1993, warrants a different conclusion. The record shows that, at most, Martiki supervisors (1) recommended applicants who subsequently were hired independently by Charles Clearing, and (2) provided Charles Clearing application forms to applicants and either delivered the completed forms to Charles Clearing or instructed the applicants to do so. There is no evidence that Martiki exercised any control or influence over Charles Clearing's postlayoff hiring decisions. Argyle Charles described Martiki's role as ''[t]hey just told me they thought they would make good employees . . . they never insisted I'd hire them. They just give them a recommendation.''

In summary, we have found that Respondent Charles Clearing violated Section 8(a)(1) of the Act by failing to reinstate the identified laid-off economic strikers. We reverse the judge's finding that Martiki was a joint employer of Charles Clearing's employees when the unfair labor practice was committed. Accordingly, we find that Martiki cannot be held liable for Charles Clearing's unlawful failure to reinstate the laid-off strikers or for their resulting backpay. Further, because we have found that Martiki is not a joint employer with Charles Clearing, we need not decide the status of Martiki's parent company, Respondent Mapco Coal, Inc. Accordingly, the complaint allegations relating to Respondent Mapco Coal and Respondent Martiki Coal are dismissed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent,

[8] Muncy was called as a witness by the General Counsel. The judge generally credited the General Counsel's witnesses regarding working conditions and circumstances at the worksite. Bailey was not laid off and remained employed by Charles Clearing at all relevant times.

Charles Clearing Contractor, Inc., Lovely, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Failing and refusing to reinstate or to recall laid-off economic strikers to their former or substantially equivalent positions because they engaged in protected concerted activities.''

2. Substitute the following for paragraph 2(a).

''(a) Offer Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Willis Fletcher (on an unconditional offer to return to work), Craig Hale, Ronnie Hall, Paul Hinkle (on an unconditional offer to return to work), Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mickey Jude, Warren Jude, Brian Lowe, Freddy Moore (on an unconditional offer to return to work), Shelby Moore, Harold Muncy, Stewart Preece, Chester Ramey, Jeffrey Taylor, Jonathan Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb immediate and full reinstatement and make them whole, with interest, for the losses they incurred as a result of the failure to reinstate them in the manner specified in the remedy section of the judge's decision.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act by failing and refusing to reinstate or to recall laid off economic strikers to their former or substantially equivalent positions because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Willis Fletcher (on an unconditional offer to return to work), Craig Hale, Ronnie Hall, Paul Hinkle (on an unconditional offer to return to work), Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mikey Jude, Warren Jude, Brian Lowe, Freddy Moore (on an unconditional offer to return to work), Shelby Moore, Harold Muncy, Stewart Preece, Chester Ramey, Jeffrey Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb immediate and full reinstatement and make them whole, with interest, for the losses they incurred as a result of our failure to reinstate or recall them to their former or substantially equivalent positions, in the manner specified in the remedy section of the judge's decision.

CHARLES CLEARING CONTRACTORS, INC.

Vyrone A. Cravanas, Esq., for the General Counsel.
Thomas P. Gies, Esq. and *Glenn D. Grant, Esq.*, of Washington, D.C., for Respondent Martiki Coal Corporation.
Susan E. Chetlin, Esq., of Lexington, Kentucky, for Respondent Mapco Coal, Inc.
C. Tom Anderson, Esq., of Pikeville, Kentucky, for Respondent Charles Clearing Contractor, Inc.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Prestonburg, Kentucky, on March 23–26 and in Huntington, West Virginia, on April 8 and 9, 1993. The proceeding is based on a charge filed September 23, 1992,[1] by Bill R. Webb, an individual. The Regional Director's complaint, dated November 1992, alleges that Respondents Martiki Coal Corporation and Mapco Coal, Inc. are single employers; that Charles Clearing Contractor, Inc. and Martiki Coal Corporation are joint employers within the meaning of the Act; and that Charles Clearing violated Section 8(a)(1) and (4) of the Act by failing to recall laid-off employees who engaged in protected concerted activities and who filed or participated in the investigation of prior unfair labor practice charges.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Charles Clearing is engaged in mining coal near Lovely, Kentucky, under contract with Respondent Martiki Coal. The latter is affiliated with Respondent Mapco Coal and during the 12-month period ending July 31, 1992, Respondents Martiki and Mapco sold and shipped from their Lovely, Kentucky facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky

[1] All following dates will be in 1992 unless otherwise indicated.

and Respondent Charles Clearing provided services valued in excess of $50,000 during this period to the other Respondents.

Accordingly, it is concluded that at all times material Respondents, collectively and individually, have each been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Charles Clearing, a Kentucky corporation (incorporated February 19, 1991), whose sole shareholder and president is Argyle Charles, is engaged in mining coal pursuant to a written 1988 contract with Martiki Coal executed when Charles Clearing was a sole proprietorship.

Charles Clearing essentially provides labor for the operation of the Martiki surface mine but also does sporadic timber clearing approximately 3 months a year. Charles Clearing's employees operate Martiki's equipment on that company's minesite and is compensated at an hourly rate. Martiki's Lovely, Kentucky minesite otherwise specifically is identified as a source of production of tonnage, sales, and coal reserves for Respondent Mapco Coal in its annual report for 1991.

Martiki's surface mining operation in Martin County Kentucky is the first surface mine in Appalachia to be mined with a dragline using the mountaintop surface removal method of mining. The Martiki leasehold is approximately 20–25 square miles, and over 6000 acres have been mined or reclaimed to date. Martiki shipped approximately 1.7 million tons of coal for its onsite preparation plant in 1992. After the mining operation is concluded, Martiki conducts an extensive reclamation operation. Reclamation includes the use of graders and bulldozers to smooth out the disturbed land. After a section of land has been graded, it is seeded with grass through a hydro-seeder operation. Prior to 1985 Martiki used its own employees for all mining activities, but it laid off all but salaried employees at that time.

Respondent Charles Clearing currently (April 1993) has approximately 78 employees at the minesite, 2 more than it had in February 1992. Employees Warren Jude and Wanda Bailey were hired by Charles Clearing and assigned to operate hydro-seeding equipment on areas being reclaimed. They were paid at a rate of $6 per hour, while other employees hired by Clearing were being paid $9.50 per hour. Jude repeatedly asked Clearing's owner, Argyle Charles, to be paid the same as the other employees, but was put off. In that regard, Jude testified that Charles told him that he needed the go ahead from William Houser, operations manager for Martiki. When Charles hired a new rock truckdriver and began paying the driver $9.50 per hour, Jude decided to go on strike and, when he arrived for work on the morning of Monday, February 3, he set up a picket line on the road to Respondent Martiki's mine, by putting up a sign which read ''on strike.'' None of the other Charles Clearing employees crossed his picket line. During discussions that morning, the employees decided that they were all underpaid and adopted Jude's cause as their own. Over the course of the next few days, Charles unsuccessfully solicited his employees to return to work, stating that Martiki would pull his contract. On February 4, Martiki informed Charles Clearing, in writing, that unless Clearing's employees returned to work that afternoon, Clearing would be in material breach of their contract and Martiki would seek termination of the agreement and Charles then told the employees about Martiki's letter. On Tuesday, the employees indicated they were not returning to work without a raise. When the strike continued, Charles unsuccessfully attempted to get Martiki to give him more money per employee. (In 1990 Charles initiated a renegotiation of the contract terms of an increase to $15.50 an hour from $14 an hour.) On Wednesday, Martiki obtained a local court restraining order against the picketers and the number of pickets was thereafter reduced to four people. In a deposition related to the restraining order Martiki claimed a purported loss in sales of 30,000 tons (eight shifts), due to the strike.

On February 6, about 32 of the approximately 78 striking employees returned to work. The following day, Martiki met with Charles and advised him that Martiki had decided to cut back production at the mine.[2] Charles determined that about 50 persons would be sufficient and attempted to relay the information to the striking employees. He decided to keep the 32 employees who were at work on February 6, along with the first 18 employees to call him over the weekend and express a willingness to cross the picket line.

On Friday night and over the weekend, Martiki General Mine Foreman John Muncy spoke with Charles Clearing employees Douglas Wilson and Jeff Taylor. Wilson testified that on Tuesday Muncy had told a ''friend'' that he wanted Wilson to call him. When he spoke to Muncy, Muncy advised him he should report to work. On Friday after he had heard that Charles was supposed to contact them about whether they had jobs, he called Muncy again. Muncy said he'd have his job and Charles would call. No call was forthcoming so Wilson called again on Sunday and Muncy said not to worry and to be at work on Monday and that he had a list of laid-off people. He then said he couldn't find the list but remembered that Willis Fletcher, Bill Webb, Steve Boyd, and Stewart Preece were on the list, but not him. On Monday, however, he reported to work and was told by Charles that he already had his 50 men and he and the rest were laid off. On Friday, Muncy also called Taylor and asked when he and his father (Leon) ''was going to return to work,'' but on Sunday Charles called the Taylors' and told them he was sorry but he had to let them go as they had cut him back to 50 men.[3]

Stewart Preece and Mickey Jude testified that they received their layoff slips from Charles personally on Monday afternoon, at a church parking lot near the Martiki property.

[2] Martiki later successfully explained to the Board that this cutback was based on valid business reasons due to contract reductions by a major customer. This would appear to make its contemporaneous claim that is suffered a 30,000 ton loss of sales as a result of the strike to be misleading.

[3] Willis Fletcher testified that he learned of the layoff in a conversation with Charles on Friday (when there were only four persons on the picket line), in which Charles told several individuals they would be laid off on Monday because he had been cut back by Martiki. Shelby Moore testified that he learned of the layoff in a conversation with Charles on Sunday morning, and that Charles told him that he had been laid off because he had been cut back to 50 employees. Hank Webb testified that on Saturday Charles told him that he did not have any openings, because he had already filled his complement of 50 employees. Brian Holbrook testified that he called Charles on Saturday and was told that he already had 50 employees. James Arnette testified that he called Charles on Sunday and was told he was laid off.

Douglas Wilson's layoff slip was delivered by his wife who is an employee of Martiki Coal.

Charles testified that ''by the weekend'' he had 30 employees working and that 20 employees who contacted him over the weekend went back to work. It was stipulated that the following 26 employees were laid off February 10: Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Willis Fletcher, Craig Hale, Ronnie Hall, Paul Hinkle, Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mickey Jude, Warren Jude, Brian Lowe, Freddy Moore, Shelby Moore, Harold Muncy, Stewart Preece, Chester Ramey, Jeffrey Taylor, Jonathan Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb. Charles testified that more than 20 people had called him on the weekend and he told them he ''would try to get them back.''

On brief, Respondent Charles Clearing admits that it did not rehire all the employees that either called or showed up for work, but asserts that the reason for the failure to rehire these employees is that there were no openings at the specific time that they called and that thereafter, Charles simply forgot that they had called and he did not recall them. Charles also testified that throughout the course of his business, he has had several other layoffs and hirings, but that he has no set procedures or guidelines that he uses in such events.

In July 1992, the demand for operation by Martiki Coal was increased such that Charles Clearing needed to operate at the same level that had existed at the time of the February layoff and it began hiring. Henry Boyd, Harold Muncy, Chester Ramey, and later Ronnie Hall, all former picketers, were recalled either initially or shortly thereafter. (Muncy, Boyd, and Ramey were three of the several employees that showed up on the morning of February 10.) There were numerous new hirings throughout midsummer and early fall of 1992 that brought Charles Clearing employment to 76 people. The asserted major source of people for the jobs were job applications filed with Charles Clearing. No effort was made to contact ''laid-off'' employees, however, one or more were ''rehired,'' if they contacted Charles at an opportune time. Jonathan Taylor was called by Charles in October and offered a job operating a loader and was told his prior job operating a shovel was filled. Craig Hale was a warehouseman at the time of his layoff. This position never was refilled, however, Hale was put back to work as a truckdriver in August.

Between the time hiring began on May 27 and October 4, 4 laid-off employees returned and 36 new employees were hired (4 of whom also were terminated after 4 weeks or less). Two of these were part-time general laborers, however, two were oilers and the rest were truckdrivers or equipment operators, including two shovel operators hired July 6 and August 10, respectively.

Meanwhile, on March 25, Warren Jude filed a charge on behalf of other similarly situated employees alleging that the layoffs were an unfair labor practice. The Regional Director conducted an investigation and it is stipulated that the charge was dismissed by the Regional Director. The charges in this proceeding were filed on September 23.

III. DISCUSSION

Although the February 10 layoff itself is not alleged as an unfair labor practice in this proceeding, the Employers' failure to recall laid-off employees, occurred within 6 months of the filing of the instant charge on September 23, and these occurrences arose out of the actions and conditions that were in place at the time of the layoffs on February 10. Accordingly, the record was developed and will be evaluated to consider whether primary employer Charles Clearing violated the Act as well as to determine if Martiki Coal was a joint employer at a relevant time such that it should be found to bear a responsibility for any remedy found to be warranted and whether Mapco Coal is a single employer with Martiki Coal such that it also would share a responsibility for any remedial liability.

A. *The Basic Unfair Labor Practice Charge and Employer Charles Clearing Contractors*

It is clear that the employees' February economic strike over wages was an activity protected by Section 7 of the Act. Wanda Bailey (whose job was the same as Warren Jude, the initial striker) was called by Respondent Charles Clearing and testified that she had talked with Jude about their wages being less than newly hired truckdrivers but learned of the strike and that it was on behalf of her and Jude's getting equal wages when she saw his truck and signs and 20 or more people. She honored the picket line and later that day spoke with Owner Charles about the pay and he said he had to ''go up on the hill and talk with Bill (Houser).'' She said that about 3 hours later he came back and said he would give ''up'' $9.50 if everyone would go back to work. For some unexplained reason this ''offer'' was never clearly communicated to all the employees and Bailey, along with others, continued their picketing and apparently asserted a desire for a general wage increase.

Bailey testified that she showed up for work the Tuesday after the strike, not Monday, because she ''had never gotten a clear answer'' if she had her job or not as Charles had told her on the weekend when she called that he thought he had his 20 but if he needed her he would call her as he first ''had to talk to Bill.'' Charles did call her that Monday but at 8 a.m. after the shift had started. She returned on Tuesday and began receiving pay at the higher rate demanded in the strike. Here, it appears that Bailey was not part of the initial 20 to be retained but was recalled after Charles got some advice from Martiki's operations manager and after Douglas Wilson was selected for layoff. Otherwise, however, it is clear that the employees who had not returned by Friday or who had not been selected as part of the 20 workers needed to fill the Employer newly reduced complement of 50 employees were placed on layoff and specifically given layoff slips. It also is clear that these laid-off strikers subsequently but unsuccessfully attempted to pursue unfair labor charges because of their layoff.

Under the principles laid down by the Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and the Board in *Laidlaw Corp.*, 171 NLRB 1366 (1968), an economic striker has continued status as an employee and entitlement, on request, to be returned to his former job, or a substantially equivalent position absent proof of ''legitimate and substantial business reasons.''

With the exception of striker Willis Fletcher, the record clearly shows that after Charles announced he was being required to cut back to 50 employees, most of the strikers made unconditional offers to return to work by calling him

on Friday or the weekend, by showing up at work on Monday, February 10, or by subsequently calling him. Thereafter, it was the Respondent who bore the burden of seeking out and contacting the employee and the mere passage of 3 to 10 months did not limit the employees' fundamental right to reinstatement, see *U.S. Mineral Products Co*., 276 NLRB 140, 142 (1985).

With regards to Willis Fletcher there is some ambiguity in the record concerning whether or not he made an unconditional offer to return. Charles testified that he was under the impression that the employees were refusing to work for $9.50 an hour because Fletcher said on Friday afternoon that he wouldn't work for $9.50 an hour and on Monday the 10th after being given his layoff slip; ''asked to come eat dinner with him anytime, but he would not work for $9.50 an hour,'' Fletcher did not recall the conversation on Friday except to the extent that Charles said he was going to lay ''us'' off. When questioned by Respondent's counsel he denied saying to Charles that he ''would rather be on welfare than work for $9.50 an hour,'' but this question does not confirm with Charles' subsequent testimony of what allegedly was said, but Fletcher remembered that he said: ''Now Argyle (Charles) I don't have a thing in the world against you.'' He also said he called Charles twice when the phone was answered by Mrs. Charles and Charles was out. He also agreed that he and Bill Webb did most of the talking, but that Webb did more. Webb testified Fletcher did.

Here, by laying off all of the employees who were not among the first 50 to offer to return to work Respondent otherwise demonstrated to them the futility of applying further for reinstatement, compare *Cargill Poultry Co*., 292 NLRB 738, 740 (1989), and the Board's discussion of *Abilities & Goodwill, Inc*., 241 NLRB 27 (1979).

Despite the Respondent's attempts to distinguish the later two cases, the rational of these cases appears to be applicable to the General Counsel's contentions that Respondent Charles' act of specifically laying off the several employees who were not among the first 50 to return was the cause of their unemployment on and after February 10, not the strike that had occurred the previous week. Although not every one attempted to call Charles, several of those who did call on the weekend were denied jobs, as were several others who appeared at the jobsite ready to work on February 10, and as were several who made phone inquiries later in the year. This, of course, further indicates the futility for employees to make specific additional pleas for reinstatement. Moreover, it is clear that the former strikers clearly signified their intent to return to work by reporting to work and otherwise calling (as well as by ending all picketing), and that this was recognized by Charles who specifically accepted them and asserted that ''he would try to get them back'' or that he would ''call and let them know,'' or later said ''if something opened up he would give them a call,'' or called them later and offered rehire on positions on other equipment.

Yet, when certain vacancies occurred and when the time came in July when Martiki authorized increased production and an expansion in employment levels to that which existed prior to the mass layoff, Charles disregarded his promises and thereafter (with some exceptions), ''simply forgot'' that the laid-off employees were there.

Other than the initial, collective protest and strike, one intervening event had occurred, the filing of charges by the laid-off employees on March 25, which asserted that the layoffs were an unfair labor practice. Based on the timing of Respondent's actions in hiring new workers rather than recalling laid-off employees, shortly after the Region declined to issue a complaint, I infer a discriminatory motivation in its actions. Otherwise, however, no specific finding regarding motivation is necessary, because the employer's conduct under these circumstances is inherently destructive of employee interest and the employees' entitlement to recall under the principles of *Fleetwood Trailer* and *Laidlaw Corp*., supra.

Most of the laid-off employees were not called or informed that Charles was hiring or returning to its former staffing levels. They were not offered their old job, but instead new hires were made for most of the positions in disregard of Respondent's *Laidlaw* obligations and Charles' promises. Also, no valid business reason is advanced by the Respondent that would refute the showing that it discriminatorly refused to recall laid-off employees because of a motivation derived from their filing of charges with the Board and I find that the General Counsel has shown persuasively that this failure to recall was a violation of Section 8(a)(1) and (4) of the Act, as alleged.

As noted, the testimony of Fletcher and Charles differed regarding statements made on February 10. Based on my observations of Fletcher's demeanor and the tenor of the conversations involved, I find that Fletcher tended to be somewhat flamboyant and independently principled in nature. I credit Charles' testimony that after Fletcher was laid off Fletcher made a defensive, face-saving comment to the effect that he personally didn't want to work for only $9.50 an hour. Accordingly, Fletcher's offer to return was conditional and, as there is no evidence that he subsequently clarified his position with an unconditional offer, I find that Charles Clearing was not obligated to offer him reinstatement.

Otherwise, I find that each of the other discriminatees made a valid unconditional offer to return or otherwise were excused from making a specific offer because of the futility of his situation after being laid off. In this connection, I also note that a new employee was hired as a shovel operator at that same time laid-off shovel operator Jonathan Taylor was told the job was filled (but was offered a job operating a loader), and under the circumstances, it therefore was not a valid recall offer and Taylor did not waive his right to recall to his former job.

Accordingly, Charles Clearing Contractors is obligated to remedy the found unfair labor practices.

B. *The Joint-Employer Status of Martiki Coal Corporation*

The court of appeals in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982), offered this following definition substantially applicable to both joint-employer and single-employer situations:

> A ''single employer'' relationship exists where two nominally separated entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a ''single employer.'' The question in the ''single employer'' situation, then, is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise. . . . In answering ques-

> tions of this type, the Board considers the four factors approved by the *Radio Union* court. (380 U.S. at 256, 85 S.Ct. at 877): (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. . . . ''Single employer'' status ultimately depends on all the circumstances of the case and is characterized as an absence of an ''arm's length relationship found among unintegrated companies.'' [Citation omitted.]

Although Respondent Martiki does not concede joint-employer status on or before February 10 when the layoffs occurred, it especially argues that certain of its practices changed after February 10 (but also after March 25 when the unfair layoff charge was filed), and that at any subsequent point thereafter, within the 10(b) 6-month period prior to the filing of the charge on September 23, it was not exercising control over Charles Clearing and thus was not a joint employer with Charles Clearing when the unfair labor practices occurred, most specifically, on and after July 6 when the first group of new hires (but including Henry Boyd Jr. who was a laid-off employee) began to be called to work in response to Martiki's demands on Charles Clearing to meet increased production goals and to return to prelayoff employment levels. Respondent Martiki's most significant action in this respect is reflected in a memo dated ''3–29–93,'' well after the instant charge was filed. This memo, prepared by Operations Manager Houser, contains a list of 13 instructions for Martiki supervisors which includes items such as: ''Don't tell or assign CCC (Charles Clearing) men what to do. Tell Foreman,'' ''Don't pass out CCC applications forms to anyone,'' and ''Problems—No Discipline—don't get between them and their foreman.'' Significantly, this is the only document of this nature (as reflected by this Respondent's response to the General Counsel's subpoena requesting all such records between February 10, 1992, and the present), relating to changes in the day-to-day operational relationships between Martiki and Charles Clearing.

Although Respondent Martiki asserts that it changed circumstances in the relationship prior to the 10(b) period, that is not clearly established as a matter of fact. Some changes, such as the abandonment assertedly ''in February'' of the prior practice of daily joint meetings of supervisors from both companies to discuss work for the day were said to have occurred. Houser, however, testified that he was advised by his supervisor, Superintendent John Stucker, to make some changes in operational procedures and that he implemented changes in March and April, as an ongoing phase, and he testified that he told his staff: ''In March or April, I'm not sure when'' that they ''would not direct Charles Clearing people whatsoever.'' Otherwise, there is little, if any, specific evidence of when changes occurred in practices involving its supervisory type relationship with Charles Clearing employees (for example, Charles testified that he got a van to transport his workers around the jobsite but did not state when), and it apparently was necessary for Houser to amplify or formalize his asserted changes in a list reflected in the 13 items set forth in Houser's March 29, 1993 memo, Respondent's only document on the subject.

This, of course, was well *after* the 10(b) period and, accordingly, I conclude that Respondent Martiki has not shown that it significantly changed its joint-employer type practices and relationships, otherwise discussed below, prior to 6 months before the charge was filed. This conclusion is reinforced by Charles who credibly testified that 13 named persons he hired on and after new hiring began in July were recommended by Martiki supervisors (including Houser) and two were recommended by Pontiki supervisors (Pontiki is another coal company affiliated with Martiki and Mapco Coal), and that these applicants brought in applications on Charles Clearing forms that the Martiki supervisors had gotten from Charles Clearings' office trailer. Accordingly, I further find that Martiki cannot use the 10(b) rationale as a valid excuse for avoiding contingent liability because of its prior joint-employer status.

Otherwise, however, I would also find that the status of these parties on February 10 would be controlling inasmuch as this was when the initial and underlying act occurred (the layoff), which, although not an unfair labor practice in and of itself, triggered the subsequent events in July through October (the failure and refusal to recall these laid-off employees), which are shown to have been a violation of the Act.

Respondent Martiki also argues that it was not involved in the alleged unfair failure to rehire employees and therefore should not be held to any responsibility for Charles Clearing's unlawful action. Here, I am satisfied, as further discussed below, that the General Counsel has shown that the two employees are joint employers of a group of employees and that Respondent Charles Clearing illegally failed and refused to reemploy laid-off members of the jointly managed work force. Therefore, the burden is on Respondent Martiki, who here seeks to escape liability for its joint-employers' unlawfully motivated action, to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action. See *Capitol EMI Music*, 311 NLRB 997 (1993).

Martiki obviously was well aware of the expansion of its co-Respondent's work force in and after July as it was done at its request in order to increase production levels and it also was well aware of all the background events surrounding the layoff and it also caused the layoff (but not illegally), when it decreased production in February. It was involved in the dismissed charge related to that event, it was represented by knowledgeable counsel, and it knew or should have known that the laid-off employees had potentially enforceable expectation of being recalled. It is not shown that it took any measures within its power to resist or advise against Charles Clearing's action in hiring new employees rather than recalling laid-off employees. To the contrary, the record here persuasively shows that it aided and abetted that illegal action through the actions of its supervisors and those of its affiliated company, Pontiki Coal, in procuring applications and recommending specific persons who were not laid-off employees for the now available positions formerly held by the laid-off employees.[4]

[4] One new employee, Larry Lyons, was a dozer operator who was hired on the recommendation of Martiki Supervisor Danny VanHoose on May 5 and worked until June 4. VanHoose also recommended the hiring of Lance Combs who was hired as a part-time laborer on September 8.

These recommendations were endorsed and followed by Charles Clearing for approximately 12 positions[5] that could have been offered to laid-off employees. Over a dozen jobs as truckdrivers and equipment operators went to other new hires and only 4 of 26 former employees were recalled to their former jobs. Accordingly, I find Respondent Martiki has not shown a valid reason why it should escape liability for the involved unlawful action. Rather, its actions in effectively recommending the hiring of employees as late as July, August, and September clearly shows that despite an awareness that on and prior to February 10 it had been involved in probable demonstrations of direction and control of the Charles Clearing employees and despite an initial effort to change some of its more blatant practices, it still had not divorced itself from exerting its influence on the highly critical elements of hiring and tenure of employment.

Turning now to a summary of the factors of record which clearly support the General Counsel's claim of single-employee status, I note that although the Respondent consistently minimizes the extent or nature of some of the occurrences described in the testimony of the General Counsel's witnesses, I find that these witnesses displayed a basic personal integrity and honest and down to earth demeanor that persuades me that the elemental substance of their testimony should be found credible. For example, Martiki witness James McCoy testified that he worked with Steve Boyd while he operated a grader (but not the dozer) and that Boyd got his orders from Charles Clearing Foreman Parker 95 percent of the time as he did. Boyd, however, testified about who gave him instructions as follows:

> When I ran the dozer, which was 3 to 4 months, John Muncy usually, I'd say 95 percent of the time, told me what to do. There are other times when Bill Houser would tell me what to do and occasionally Doug would. But I'd say 95 percent of the time was John Muncy.

Boyd then answered it was about the same when he was on the grader, plus Martiki Supervisor VanHoose if reclamation work required grading. McCoy based his knowledge of Boyd's work orders on his recognition of voices on the radio, which was the general means of communication with truckdrivers and equipment operators, as all units were equipped with radios. By implication, McCoy admits to at least 5 percent of the employees daily instructions coming from Martiki supervisors and I find Boyd's testimony, while probably exaggerated, to be indicative of factual involvement by Martiki supervisors in the daily provision of on the job instructions to Boyd to have been at least greater than 10 percent or more of the time, and I find that other employees credibly testified that they were supervised by Martiki personnel on a regular, significant, and sustained basis.

In this connection, it is observed that Owner Charles usually did not engage in onsite production supervision of his employees leaving only one Charles Clearing supervisor per shift to supervise up to approximately 40 employees working in different areas where Martiki had their day-to-day shift foremen in various areas plus an operations manager and, occasionally, a general superintendent.

To review the makeup and daily operation of the jobsite, it is comprised of a leasehold area of 20–25 square miles with over 6000 acres mined and in the process of being reclaimed in a method known as ''mountaintop surface removal,'' a method dependent on the use of dump trucks, bulldozers, loader, and graders, and drag lines. Essentially all the employees used in this primary phase of the operation, except the drag line operators, were Charles County employees (the oiler who serves each drag line, however, was a Charles Clearing employee). Other ''subcontractors'' provided such things as electrical, machinery maintenance, and repair and blasting services and Martiki has directly employed personnel to operate the onsite preparation plant to which the raw coal was delivered by Charles Clearing employees for washing, sizing, and transfer to railcar for shipment.

In February 1992 Charles Clearing had approximately 76 employees over 2 shifts under the direct day-to-day supervision of its shift foremen, Herb Musick and Dough Parker, with Owner Charles not regularly engaging in supervisory activities. As noted, John Muncy was general foreman, Mat Welch was pit foreman, Danny VanHoose was reclamation foreman, and William Houser was operations manager (two other supervisors, not directly related to this issue, supervise blasting and administrative matters), and each of these supervisors had frequent if not daily contact with the Charles Clearing employees. The jobsite obviously is wide spread and until some later date when Charles Clearing purchased a van to transport workers from the parking area near its on site trailer office, employees depended on other means to get to their work areas, which included rides with Martiki supervisors. It appears that Charles Clearing did not have a telephone separate from Martiki until ''sometime'' after March when General Superintendent John Stucker ''required'' Charles to get one. At this same time Stucker ''requested'' Charles to add to his own supervisors on the hill and gave Houser instructions to ''cease giving supervision'' to Charles Clearing employees. Stucker further testified he did so ''because there were some problems brought to our attention on the hill, because of an NLRB charge.''

The record otherwise shows that when changes began to be made, they were not initiated or promulgated by Charles Clearing and this further support a conclusion that it was Respondent Martiki who required Charles Clearing to make the adjustments in the way it operates, which further evidences Respondent Martiki's control over its operations.

The substance of employee testimony, although minimized by the supervisors, was often partially admitted to and I find that Martiki's supervisors normally and freely directed Charles Clearing employees in the work schedules and assignments, as well as in a wide range of functions that are common to an employer-employee relationship. Although many of these acts may have been careless or thoughtless, they were not unusual and they were not de minimis. Most of the employees testified that although Musick or Parker generally gave them instructions they were routinely given instructions both at the beginning of a shift or during a shift by Martiki Foreman Muncy and Welch and they considered these Martiki supervisors to be their main bosses. Occasionally they would be asked to work overtime or on weekends by Martiki supervisors and did so when there would be no Charles Clearing ''bosses'' there. Martiki supervisors offered

[5] In this connection the spelling on pp. 650 and 651 of the transcript of named employees William and Frank Jarrell is corrected from what was incorrectly transcribed as ''Geralds.''

Charles Clearing employees the opportunity to change jobs (for example from truckdriver to dozer operator) and also told employees, when asked, such things as to not worry but just let that Martiki supervisor know, if they needed to take time off. Martiki supervisors regularly tested prospective Charles Clearing employees on their skills in operating equipment and regularly recommended new employees. Just as regularly, Charles endorsed these recommendations and hired that person.

The functional integration of the Charles Clearing-Martiki Coal relationship demonstrates that Charles Clearing is not involved in some incidental support or accessorial service but performs the basic and preeminent labor functions of the overall enterprise, specifically the removal of overburden, extraction of raw coal, onsite transportation, and reclamation. As shown on the record and as discussed above, Martiki supervisors have consistently played a significant roll in directing and controlling the actual employees' activities. Martiki also dominated in some of the factors generally considered as indicative of independent contractor status. These standards apply whether the ''person'' alleged to be an independent contractor is an individual or a business entity.

Here, Martiki (or its parent) own the mineral rights and controls the jobsite with respect to access and security and, at the time relevant, sometimes provided transportation for the involved employees. Except for one small dozer, a back hoe, and a small dump truck, Martiki owned and supplied all the equipment driven or operated by the Charles Clearing employees. Although, in the past, Charles Clearing did contract occasionally for other land clearing jobs, in the recent past its work has been almost exclusively for Martiki (in 1990 it had a $600 contract with Martiki affiliate Pontiki Coal for brush clearing that was awarded by Martiki Vice President Dennis Jackson in his dual roll as vice president of Pontiki). It also is compensated on per-hour work formula and it has had no investment in equity and no participation in risk, especially those related to productivity, except insofar that it must provide unemployment and workman's compensation coverage. Mine safety and training for Charles Clearing employees is shielded by the interposition of a sole proprietorship owned by the mother of Martiki's safety and training director, however, the director works part time for her mother and is seen by Charles Clearing employees as a representative of Martiki in her involvement with them in these matters. Although Martiki asserts that it does not exercise meaningful control over Charles Clearing labor policies, the record clearly shows to the contrary. Charles consistently indicated to the employees that he had to check with Martiki about permissible wage rates and, in fact, he only resolved the basic wage dispute here after checking and clearing it with Martiki. Martiki also influenced his labor policies by deciding to cut back the work force at this time of a labor dispute. The agreement between the parties may be terminated on 30-day notice and is essentially an ''at will'' agreement. Although the terms of the contract describe Charles Clearing as an independent contractor and state that the agreement does not create a joint-employer, single-employer, or agency relationship, such language is merely self-serving and does not control or limit the Board's statutory rights and obligation to make this determination.

Section 2(2) of the Act states that the term ''employer'' includes any person (i.e., one or more corporations) acting as an agent of an employer. Section 2(3) of the National Labor Relations Act provides that coverage is extended to ''employees,'' but not to ''individuals having the status of an independent contractor.'' This express statutory exclusion of independent contractors was not contained in the original Act, but was added by Congress in 1974. The basic and consistent purpose of the Act is to reach employees with the protection of law. To recognize the operation of technically separate legal entities so that one may avoid the policies of the Act, to the potential detriment of the Board's ability to provide an effective remedy, would defeat the policy of the Act were the concepts of single and joint employership not held to a standard that recognizes the control aspects of any relationship despite the illusion of a corporate veil or legal manipulations that seek to mask the identity of the actual controlling party.

In *Standard Oil Co.*, 230 NLRB 967 (1977), the Board used the general provisions of Restatement 2d, *Agency* § 220 (1985), and set forth standards which parallel the Restatement, stating:

> Among factors considered significant at common law in connection with the ''right to control'' test in determining whether an employer relationship exists are (1) whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss. [Citation omitted.]

These provisions detail the more concise standards generally noted in single-joint employer cases and, when applied to the record here, provide ample support for a conclusion that Martiki Coal and Charles Clearing are joint employers.

While it clearly may be appropriate for Martiki to utilize the services of another entity to perform jobsite services and to validly gain advantages with respect to such things as insurance, taxes and workman's and unemployment compensation with the regulations of other regulatory bodies, it cannot evade responsibility under the National Labor Relations Act for legal wrongs done to the workers who provided it with the means to profit from the introduction of goods into commerce. The fact that its method of operations may be valid for these other purposes does not shield it from fundamental responsibility under the Labor Act where, as here, its actual operations compromise the purported independent relationship. Here, it has exercised consistent and sufficient influ-

ence on the allegedly independent operations of Charles Clearing to such a degree that the operations have effectively been those of a single-integrated enterprise.

Here, Martiki supported the creation of Charles Clearing, which is effectively a corporate shell, and used it as an instrumentality to perform its necessary mining operations, operations that could not be independently performed by Charles Clearing because it lacked sufficient assets to obtain and maintain the required trucks, loaders, and other necessary equipment.

Although corporate boundaries were established, Martiki consistently disregarded the formalities, failed to maintain an arm's-length relationship and so intermingled its operations with those of Charles Clearing that they must be found to be joint employers.

This conclusion is especially valid because here, Martiki was not a noninvolved bystander in the principal event in Charles Clearing's violation of the Act, namely the hiring of ''new'' employees and the refusal to recall laid-off employees. Not only did Martiki, an experienced and sophisticated business enterprise, not counsel Charles Clearing (or its own supervisors) of its probable responsibilities to the laid-off workers, it actively was a direct contributing cause to Charles Clearing's violation of the Act through the actions of its supervisors who indisputably obtained Charles Clearing application forms from Charles Clearing's office trailer and recommended approximately a dozen new employees for hire (an effective recommendation as Charles had never turned down a Martiki recommended prospect when he had an opening), in lieu of at least remaining neutral and allowing Charles Clearing the option to take some other course of action.

Martiki has shared in the culpability of Charles Clearing and, under the circumstances, the corporate veil should not be allowed to shield it from liability where, as here, it has profited from the use of Charles Clearing as its instrumentality and a potential injustice to the discriminatees could result if Charles Clearing should be incapable of satisfying the obligation required to remedy the found violation of the Act. Accordingly, I conclude that a joint-employer relationship has been established on the record and that Martiki Coal is liable under the Act to remedy the unlawful acts found above.

C. *The Single-Employer Status of Mapco Coal*

Mapco Coal is one of several subsidiary companies (include Mapco Petroleum Inc., Mapco Natural Gas Liquids Inc., and Mapco Transportation Inc., a pipeline carrier), owned by Mapco Inc., a large publicly traded corporation. For purposes of this inquiry it appears that none of these other subsidiaries are involved in services or management related to Martiki Coal.

Mapco Coal ranks 20th in national coal production statistics and is the parent corporation of Webster County Coal Corporation, Pontiki Coal Corporation, South Atlantic Coal Corporation, Mettiki Coal Corporation, White County Coal Corporation, and Respondent Martiki, companies that operate eight coal mines in four States: Kentucky, Illinois, Maryland, and Virginia. Mapco Coal operates from offices located in Tulsa, Oklahoma, and Lexington, Kentucky. It provides its subsidiaries with coal marketing services, as well as certain technical and administrative services under formal, written service agreements that provide for payment by the subsidiaries.

Mapco Inc.'s 1991 annual report describes Mapco Coal's operations as ''strategically diversified as to the type of coal produced, location of operations, mining and transportation methods employed, and customer base. Mapco's Dotiki and Retiki Mines in western Kentucky and the Pattiki Mine in southern Illinois produce a high sulfur coal. The Martiki and Pontiki Mines in eastern Kentucky produce a low sulfur, high BTU steam coal utilizing surface and underground mining methods.''

General Superintendent John Stucker, who is responsible for the day-to-day operations at the Martiki minesite, indicated that he consults on policy decisions with his supervisors in Lexington. He ''talks to'' superiors but does not necessarily ''consult'' with anyone in Tulsa. For a 3- to 4-year period prior to his Martiki position, Stucker was vice president of engineering and planning for Mapco Land and Development Company at Mapco's Tulsa headquarters.

At Lexington, Dennis Jackson serves as vice president of operations for Martiki as well as other Mapco subsidiaries Pontiki and Toptiki. The latter is an underground mine that sells its coal to Martiki. Pontiki coal has been blended with Martiki Coal at Martiki or at a port of departure in Norfolk, Virginia, in the past but not ''recently.''

Martiki receives a number of services from Mapco Coal in administrative areas and in coal marketing and permitting, especially in environmental and mining matters. Services are provided pursuant to a formal, written service agreement with provisions for payment set on an annual basis by Martiki. (In 1992, Martiki paid Mapco Coal a total of $1,615,875 for services, $364,609 for coal marketing, $618,548 for coal administration and engineering services, and $632,718 for corporate overhead, payroll, and accounting services.) Otherwise, however, the agreement also specifically recognizes that Martiki will not pay for any ''stewardship'' services Mapco provides ''for its own purposes.''

While Martiki personnel who generally are not directly affiliated with Mapco conduct the subsidiary's day-to-day operations, they frequently, consult with the Mapco's Lexington or Tulsa offices, they receive guidelines, publications (i.e., such as employee handbooks and benefits plans), and formats (with the Mapco logo), that generally are utilized and followed. And, while Mapco President Joseph Craft may only visit Martiki twice a year, it is clear that Mapco, through Vice President Jackson and the Mapco services, publications, and suggested guidelines, exerts a strong influence on Martiki's place in the integrated collection of coal companies that make up Mapco Coal, regardless of Mapco's direct participation in some routine operational matters. Not only does Mapco ''assist'' with permitting, safety, and environmental matters, it also does so in such things as engineering functions and workers compensation claims for its subsidiaries, including Martiki. Most significantly, Jackson performs controlling roles as operational vice president of Martiki and two other producing subsidiaries of Mapco. Moreover, the Mapco marketing group, through its development of sales contracts from the market place, dictates the qualitative and quantitative production and controls the transportation of Martiki's product. Such marketing is controlled by a vice president of marketing in Tulsa, working through his sales agents in several more eastern locations.

The criteria for the evaluation of Mapco's status as a single employer has been set forth and discussed above. Although Mapco is not as large as some of the other conglomerates that tend to dominate the coal industry, it appears to follow the generalized practice of what has been called ''corporate paper-shuffling'' by maintaining separate corporate entities at separate operating locations. While the purposes for this structuring may be varied and while it may serve legitimate and legal purposes especially in areas such as state and local taxation, it cannot be accepted as a carte blanc rationalization for avoidance of responsibility for the rights of employees guaranteed them under the National Labor Relations Act.

Here, the record shows numerous and persuasive factors that are indicative of the true nature of Respondent Mapco's controlling relationship with it subsidiary, Martiki. I find no persuasive or overriding reasons why the Board should not match ownership with responsibility and disregard the corporate veil. Here, they are sufficiently integrated in practice and effect to show that Mapco controls Martiki for purposes related to the employer-employee relationship which is the subject of the National Labor Relations Act and I conclude that Mapco Coal and its subsidiary Martiki Coal are a single-integrated enterprise. Accordingly, I find that Mapco Coal is a party, along with Charles Clearing and Martiki Coal, responsible for satisfaction of the remedy imposed here.

CONCLUSIONS OF LAW

1. Respondents Mapco Coal, Inc., and its wholly-owned subsidiary Martiki Coal Corporation are single employers; Martiki Coal Corporation is a joint employer with Respondent Charles Clearing Contractors, Inc.; and they are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing and refusing to reinstate the following laid-off employees, Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Craig Hale, Ronnie Hall, Paul Hinkle, Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mickey Jude, Warren Jude, Brian Lowe, Freddy Moore, Shelby Moore, Harold Muncy, Stewart Preece, Chester Ramey, Jeffrey Taylor, Jonathan Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb, after they filed charges with the Board, when jobs began to be available on and after May 27, 1992, Respondent Charles Clearing Contractor, Inc. has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (4) of the Act.

3. By virtue of Respondent Martiki Coal's direct contribution to the commission of this unfair labor practice and because of its status as a single employer with Mapco Coal, Mapco Coal and its subsidiary Martiki Coal also are jointly liable and responsible for the relief ordered here to remedy the violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as Respondent failed and refused to offer timely recall from layoff to the following individuals placed on layoff status on February 12, 1992:

> Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Craig Hale, Ronnie Hall, Paul Hinkle, Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mickey Jude, Warren Jude, Brian Lowe, Freddy Moore, Shelby Moore, Harold Muncy, Stewart Preece, Chester Ramey, Jeffrey Taylor, Jonathan Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb.[6]

it is recommended that Respondents must offer them reinstatement to their former jobs or substantially equivalent positions, dismissing, if necessary, any part-time employees or employees hired subsequent to February 10, 1992, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7]

In addition, if laid-off employee Willis Fletcher shall make an unconditional offer to return to work, he shall be placed in a preferential hiring status for any vacancy at his former job or substantially equivalent position. Otherwise it is not considered necessary to issue a broad Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondents, Mapco Coal, Inc., and its wholly-owned subsidiary Martiki Coal Corporation and Charles Clearing Contractors, Inc., single and joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate or to recall laid-off economic strikers to their former or substantially equivalent positions because they engaged in protected concerted activities or because they filed a charge with the Board.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Steve Arnette, Ron Blankenship, Henry Boyd, Steve Boyd, David Conrad, Willis Fletcher (upon an unconditional offer to return to work), Craig Hale, Ronnie Hall, Paul Hinkle, Brian Holbrook, Daniel Hutchinson, David Hutchinson, Mickey Jude, Warren Jude, Brian Lowe, Freddy Moore, Shelby Moore, Harold Muncy, Stewart Preece, Ches-

[6] While it appears that certain of these individuals were recalled or rejected a recall offer at some point in time, such factor can be considered in the backpay stage of this proceeding.

[7] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ter Ramey, Jeffrey Taylor, Jonathan Taylor, Leandis Taylor, Douglas Wilson, Bill Webb, and Frank Webb immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section of this decision.

(b) Preserve and, request, make available to the Board or its agents, for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(c) Post at the facilities of Martiki Coal Corporation and Charles Clearing Contractor, Inc. in Mountain County, Kentucky, and mail to all employees of Charles Clearing Contractor, Inc., who were laid off on February 10, 1992, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''